STATE OF MICHIGAN

COURT OF APPEALS

ROBERT PALLISCO,

Plaintiff-Appellant,

v

THOMAS PALLISCO,

Defendant/Cross Plaintiff,

and

DEBORAH A. MUZZIN, a/k/a DEBORAH A. PALLISCO,

Defendant/Cross Defendant-Appellee.

UNPUBLISHED
May 21, 1999

No. 205763
Oakland Circuit Court
LC No. 94-484400 CK

Before: Markey, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Plaintiff appeals by right from the judgment of the trial court awarding him $6,350 on his complaint against defendants and awarding defendant Deborah Pallisco $14,167.02 pursuant to MCR 2.405(D). We affirm.

Plaintiff claimed that defendants, his son and his son's ex-wife, owed him $27,742 for labor, materials, and money provided by him for improvements to their residence. Plaintiff's complaint alleged that defendants had breached a promissory note in the amount of $27,742 or, alternatively, that they had been unjustly enriched. The promissory note was signed by defendant Thomas Pallisco only, but it included a recitation that he was also signing "on behalf of" his wife, defendant Deborah Pallisco. Thomas admitted liability, but filed a cross-claim against Deborah, alleging that she was responsible for half of the amount claimed by plaintiff. The trial court granted Deborah's motion for summary disposition as to Count I of plaintiff's complaint, which alleged breach of the promissory note, and as to Thomas' cross-claim. Following a bench trial on the remaining claims, the trial court found that all of the

funds advanced by plaintiff to defendants were gifts, except for the $6,350 cost of the construction of a garage.

I

Plaintiff first claims that the trial court erred in determining that the funds he advanced to defendants were gifts rather than loans. We disagree.

This Court may not set aside a trial court's findings of fact unless they are clearly erroneous. MCR 2.613(C); *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. In reviewing a trial court's findings of fact, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

There are three elements that must be satisfied if a transfer is to be regarded as a valid gift: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift. *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1997). " 'It requires less positive and unequivocal testimony to establish the delivery of a gift from a father to his children than it does between persons who are not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice.' " *Ruch v First Nat'l Bank of Three Rivers*, 326 Mich 52, 60-61; 39 NW2d 240 (1949), quoting *Love v Francis*, 63 Mich 181, 191; 29 NW 843 (1886).

Deborah testified that all of the funds advanced, except for those expended on the garage construction, were understood to be gifts. Plaintiff testified that he did not notify Deborah directly that the funds were to be repaid; rather, he spoke only to Thomas. Furthermore, plaintiff demanded payment only after defendants instituted divorce proceedings. The court noted plaintiff's business acumen and questioned his failure to produce any documentary evidence of the "loans" made or of the payments received by Thomas. Moreover, the court indicated that it simply did not believe plaintiff's and Thomas' testimony that the funds advanced were loans. This Court gives special deference to the trial court's findings when they are based upon its assessment of the witnesses' credibility. *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 325; 575 NW2d 324 (1998). The record fully justifies the court's conclusion that the expenditures made by plaintiff were intended to be gifts, and this finding is not clearly erroneous.

II

Plaintiff next claims that the trial court erred in its interpretation of MCR 2.405 and abused its discretion in awarding Deborah attorney fees pursuant to this court rule. We conclude that defendant's claims are without merit.

A

Plaintiff first contends that MCR 2.405(C) requires that a rejection of an offer of judgment must be in writing, and that the trial court therefore erred in determining that his silence constituted a rejection of Deborah's offer. The interpretation of a court rule is a question of law for which this Court conducts a de novo review. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 586; 584 NW2d 372 (1998). If the plain and ordinary language of a court rule is clear, judicial construction is neither necessary nor permitted. *In re Brown*, 229 Mich App 496, 500; 582 NW2d 530 (1998). MCR 2.405(C) clearly provides that the offer is rejected if the offeree *either* rejects it in writing *or* does not accept it by filing and serving a written acceptance within twenty-one days. Therefore, under the plain and ordinary language of the court rule, plaintiff's failure to respond to the offer of judgment constituted a rejection, and the court did not err in so holding.

B

Next, plaintiff argues that Deborah's motion to impose costs under MCR 2.405(D) was prematurely filed, and that the court therefore erred in considering the motion. We disagree. Although MCR 2.405(D) provides that a motion for costs "must be filed and served within 28 days after the entry of the judgment," this clearly is in the nature of a period of limitations. Any error in allowing Deborah to bring her motion simultaneously with her motion for entry of judgment would be harmless. The trial court had already issued its ruling that plaintiff was entitled to judgment in the amount of $6,350 and that the remainder of the funds advanced were gifts. The trial court's decision to consider the motion for imposition of attorney fees prior to or at the same time of the motion for entry of judgment is not a ground for disturbing the verdict, as failure to take such action would not be "inconsistent with substantial justice." MCR 2.613(A).

C

Plaintiff next contends that the trial court erred in several respects in making its determination that the attorney fee requested was reasonable.

Where the party opposing the taxation of costs under MCR 2.405(D) challenges the reasonableness of the fee requested, the trial court must hold an evidentiary hearing. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). The amount awarded will be upheld absent an abuse of discretion. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982); *B & B Investment Group v Gitler*, 229 Mich App 1, 15; 581 NW2d 17 (1998).

i

Plaintiff argues that the trial court erred in failing to enforce his subpoena of records from Deborah's attorney, including the fee agreement, a record of Deborah's payments, all billing statements relative to both the instant action and to defendants' divorce action, and telephone records. The

attorney produced billing statements pertaining to the instant lawsuit. The trial court did not abuse its discretion in ruling that the other subpoenaed records were irrelevant to its determination of whether the attorney fee requested was reasonable. See *Wood*, *supra* at 588.

ii

Plaintiff argues that the trial court erred in determining that the attorney fees claimed pertained only to the instant contract action and not to the previous divorce action. However, plaintiff has presented absolutely no evidence to rebut Deborah's counsel's assertion that the billing records provided pertained solely to the instant lawsuit and that they did not include any work done on the divorce case, in which judgment was entered in 1995. Although plaintiff asserts that the trial court erred in denying his request that Deborah's attorney be questioned under oath regarding the attorney fees, plaintiff has cited no authority to support this contention. The attorney, as an officer of the court, presented her billing statements and defended against each of plaintiff's counsel's objections, stating that the records were accurate and pertained solely to the instant action. Plaintiff's arguments are without basis in law or in fact.

iii

Next, plaintiff argues that the trial court impermissibly placed the burden of proof on him to demonstrate that the attorney fees were unreasonable, as evidenced by the following statement:

> Just the fact you don't think it's reasonable, how do you prove it isn't? How do you prove how much time she spent on it? It seems it could very well be very reasonable, what this entailed.
>
> I've nothing [sic] that would change my mind on it. That you think it's not reasonable, that's not enough.

The party seeking the fee bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1992). In support of Deborah's contention that the $14,167.02 requested was a reasonable fee, her attorney presented detailed billing records, listing the nature of each charge and the time spent on each item. Throughout the evidentiary hearing, plaintiff's counsel generally argued that it would have taken her less time to do a particular task than the time claimed by opposing counsel, or that opposing counsel was misrepresenting the amount of time spent on these tasks. We do not believe that, in making the above statement, the trial court was improperly placing the burden of proof on plaintiff. Rather, it was simply remarking that plaintiff had presented no evidence, other than counsel's own opinion, to rebut the evidence supplied by Deborah regarding the reasonableness of the fee.

iv

Plaintiff also contends that the court should have applied the "interest of justice" standard provided for by MCR 2.405(D)(3): "The court may, in the interest of justice, refuse to award an attorney fee under this rule." What constitutes "in the interest of justice" must be decided on a case-by-case basis. *Lamson v Martin (After Remand)*, 216 Mich App 452, 463; 549 NW2d 878 (1996). This Court has stated that

> [w]e believe that the exceptional nature of the "interest of justice" provision, the settlement-encouraging purpose of MCR 2.405, and [the] precedents of the Court set the broad parameters of the exception. Attempts to give meaning to the term "interest of justice" must fit within these parameters. We are mindful that this term is susceptible to broad readings that would consume the general rule of awarding fees and nullify MCR 2.405's purpose of encouraging settlement. The term "is not the equivalent of a legal Rorschach test on to which each jurist may project his or her individualized notion of justice." [*Luidens v 63rd Dist Court*, 219 Mich App 24, 33; 555 NW2d 709 (1996), quoting *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995).]

In *Luidens*, this Court offered three examples of "unusual circumstances" under which the "interest of justice" exception might apply: (1) where there is evidence that a party has made a token offer of judgment for gamesmanship purposes, rather than as a sincere effort at negotiation; (2) when a case involves a legal issue of first impression or an issue of public interest that should be litigated; and (3) where there is evidence of misconduct on the part of the prevailing party. *Id*. at 35-36. In this case, plaintiff essentially argued that he should not be required to pay attorney fees because he had lost on the merits. We do not believe that this is an "unusual circumstance" justifying the application of the "interest of justice" exception, and the trial court did not abuse its discretion in failing to apply the exception.

III

Third, plaintiff claims that the trial court erred in granting Deborah's motion for summary disposition as to Count I of plaintiff's complaint, which alleged breach of a promissory note. We conclude that the trial court committed no error in this regard.

This Court's review of decisions regarding motions for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the claim by the pleadings alone. *Id*. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). The motion must be granted if no factual development could justify the plaintiff's claim for relief. *Spiek, supra*.

Plaintiff argues that, although Deborah did not sign the promissory note, she should be held liable because Thomas signed the instrument "on [her] behalf." Plaintiff contends that summary disposition was inappropriate because the statute of frauds is inapplicable to the note and because he

could have developed facts that would prove that Deborah authorized Thomas to sign the note on her behalf.

To the extent that the trial court's grant of summary disposition was based on the statute of frauds, it was improper. MCL 566.132(1)(a); MSA 26.922(1)(a) is inapplicable to the instant case. " '[I]f there is *any possibility* that an oral contract is capable of being completed within a year, it is not within the statute of frauds.' " *Hill v General Motors Acceptance Corp*, 207 Mich App 504, 509; 525 NW2d 905 (1994) (emphasis in original), quoting *Drummey v Henry*, 115 Mich App 107, 111; 320 NW2d 309 (1982). In this case, the contract provided that the loan amount due "shall be payable at the time of refinancing or sale of said property and shall be due on demand." Therefore, there was a possibility that the contract might have been completed within a year, and it was not within the statute of frauds under subsection (1)(a). Furthermore, MCL 566.132(1)(b); MSA 26.922(1)(b) is also inapplicable to this matter. The clear language of the statute refers to a promise to "answer for the debt, default, or misdoings *of another person*" (emphasis added). The promissory note in this case referred to a debt which was to be paid by both defendants; it was not, for instance, a promise by Deborah to pay Thomas' debt. Therefore, the contract was not within the statute of frauds.

However, this Court will not reverse a lower court's decision where it reached the correct result for the wrong reason. *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998). The Michigan Supreme Court has held that proof of the signature of the party to be charged upon a promissory note is essential to the plaintiff's claim for breach of the note. *Pogletke v Schwanz*, 349 Mich 129, 133-134; 84 NW2d 550 (1957). Because Deborah did not sign the promissory note in the instant case, no factual development could justify plaintiff's claim for relief, and the trial court properly granted Deborah's motion for summary disposition as to Count I of the complaint. *Spiek, supra* at 337. Moreover, the trial court heard the case against both defendants based on unjust enrichment, as well as the case against Thomas based on breach of the promissory note, and determined, on the merits, that the funds advanced were gifts. It can therefore be presumed that, had summary disposition not been granted in favor of Deborah as to the breach of promissory note claim, the court would have held that there be no recovery on the note because the funds advanced were gifts. Therefore, any error in granting summary disposition as to the breach of express contract claim against Deborah would be deemed harmless. MCR 2.613(A).

IV

Finally, plaintiff argues that the trial judge was biased against him and that he should have disqualified himself. Because plaintiff did not raise the issue below by pursuing the remedy provided for in MCR 2.003, it is not preserved for our review. *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 19; 436 NW2d 70 (1989). Moreover, because there has been no showing that the judge was actually biased or prejudiced against plaintiff, MCR 2.003(B)(1) is inapplicable. *Meagher, supra* at 725-726.

Plaintiff additionally argues that the due process guarantee of impartiality required that the judge disqualify himself. However, judicial disqualification is required under the Due Process Clause only in the most extreme cases, *Meagher, supra* at 726; that is, where " 'the probability of actual bias . . . is

too high to be constitutionally tolerable.' " *Cain v Dep't of Corrections*, 451 Mich 470, 514; 548 NW2d 210 (1996) (citation omitted). Plaintiff has failed to demonstrate that the judge was prejudiced in any way against him, and the facts certainly do not demonstrate an

"extreme case" supporting a due process claim of disqualification.

We affirm.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff